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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 434

ADA L. BURROUGHS AND JAMES CANNON, JR., petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Supreme Court of the District of Columbia (R. 28–30) has not been reported. The majority and dissenting opinions in the Court of Appeals of the District of Columbia (R. 33–44) are reported in 65 F. (2d) 796.

JURISDICTION

The judgment of the Court of Appeals was entered May 15, 1933. (R. 45.) A motion for a rehearing was denied June 10, 1933. (R. 45–46.) The petition for writ of certiorari was filed in this Court September 6, 1933, and was granted October

23, 1933. (R. 49.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Federal Corrupt Practices Act is unconstitutional in so far as it requires the treasurer of a political committee to file with the Clerk of the House of Representatives statements of contributions made to or for the political committee for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors in two or more States.

2. Whether the indictment is fatally defective.

STATUTE INVOLVED

The pertinent provisions of the Federal Corrupt Practices Act of 1925, c. 368, Title II, 43 Stat. 1053, 1070–1074, are set forth in the Record at pages 34 to 36.

STATEMENT

An indictment in ten counts was returned against the petitioners in the Supreme Court of the District of Columbia. (R. 1–21.) The first eight counts charged the petitioners with violating Section 244 of Title 2 of the United States Code (the Federal Corrupt Practices Act of 1925).[1] (R. 35.)

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[1] To conform with the indictment and the opinion below, the section numbers of the Act as they appear in the United States Code rather than as they appear in the Statutes at Large are used.

The last two counts charged conspiracies, in violation of Section 37 of the Criminal Code (U.S.C., Title 18, Sec. 88), to commit the offenses alleged in the preceding counts.

Each of the counts alleged that during the period from July 22, 1928, to and including March 16, 1929, the petitioner Burroughs was the treasurer of a certain political committee called the "Headquarters Committee Anti-Smith Democrats," which then accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice-presidential electors in two States.

The first count charged that at divers times during the period mentioned contributions of money totalling $58,000 were made by one E. C. Jameson "for said political committee" in amounts ranging from $5,000 to $10,000. These contributions are set forth in a table appearing in the count. The first contribution was made September 18, 1928; the last was made October 19, 1928. The count continues with the allegation that between the 10th and 15th days next preceding November 6, 1928, the date on which a general election was held at which presidential and vice-presidential electors were elected in the several States, it became the lawful duty of petitioner Burroughs as treasurer of the political committee to file with the Clerk of the House of Representatives a statement, complete as of the day next preceding the date of the filing thereof, containing the name and address of

the contributor Jameson, together with the amount and date of each of his contributions for the political committee.

The count then charged that petitioner Burroughs—

> unlawfully and feloniously did willfully violate a certain provision of chapter 8 of title 2 of the United States Code, to wit, the provision in section 244 of said title requiring her, as treasurer of said political committee, to file with said Clerk of the House of Representatives of the United States, between said 10th and 15th days next preceding said general election, a statement pertaining to the contributions aforesaid and containing the information aforesaid, by then and there unlawfully and feloniously willfully failing to file with said Clerk, to wit, in said District of Columbia, any such statement, or any statement whatever, pertaining to said contribution—, containing any such information.

The count concluded by naming petitioner Cannon as a principal, it being charged that he unlawfully and feloniously did willfully aid and abet petitioner Burroughs in the commission of the above-described offense, "well knowing all the premises aforesaid, and well knowing said Ada L. Burroughs to be such treasurer of said political committee, and to be required by law, as such treasurer, to file such statement pertaining to said contributions of said E. C. Jameson for said po-

litical committee with said Clerk" of the House of Representatives.

This count of the indictment was based upon paragraph (b) of Section 252 of the Act (R. 36) which punishes, as felonies, "willful" violations of the statute.

The second count was predicated upon the same facts but alleged merely that the violation of the statute was "unlawful" rather than "willful." This count was based upon paragraph (a) of Section 252 of the Act, which provides for the punishment, as misdemeanors, of "violations" of the statute. (R. 36.)

The same plan was followed in the next six counts of the indictment. The third and fourth counts charged a failure to report on the 5th day prior to the general election of November 6, 1928, the same contributions referred to in the first and second counts.

The fifth and sixth counts charged a failure to report on January 1, 1929, contributions made by Jameson during the calendar year 1928 totalling $62,300 (the contributions referred to in the preceding counts, plus an additional contribution of $4,300 made on December 6, 1928).

The seventh and eighth counts charged a failure to report between the 1st and 10th days of March, 1929, a contribution of $3,000 made by Jameson on January 14, 1929.

Of these counts the third, fifth and seventh charged that the offenses were "willfully" com-

mitted; the fourth, sixth and eighth charged merely that the offenses were "unlawfully" committed.

The ninth count charged the petitioners with conspiring to commit the four "willfully" committed offenses specified in the first, third, fifth and seventh counts, while the tenth count charged them with conspiring to commit the four unlawfully committed offenses alleged in the second, fourth, sixth and eighth counts of the indictment. Both of the conspiracy counts, after setting forth in detail the contributions made by Jameson for the political committee and alleging that it was the duty of the petitioner Burroughs as treasurer of the committee to file a statement of the contributions with the Clerk of the House of Representatives, alleged that each of the petitioners herein (Burroughs as treasurer and Cannon as chairman of the political committee) "then well knowing all the premises aforesaid, unlawfully and feloniously did conspire * * * to commit" the substantive offenses charged in the eight preceding counts, the allegations of which were incorporated by reference. A number of overt acts were charged in each of the conspiracy counts.

A demurrer was interposed by the petitioners herein to the indictment on two grounds, (1) that the Corrupt Practices Act, "in so far as it attempts to regulate contributions and expenditures made to influence the election of presidential and vice presidential electors in the several States" was in

violation of various provisions of the Constitution, and (2) that the indictment was insufficient as a pleading. (R. 21–28.) The Supreme Court of the District of Columbia sustained the demurrer on the ground that the indictment was insufficient as a pleading. (R. 28–30.) The court stated that as its action disposed of the indictment it became unnecessary to pass upon the constitutional question presented by the demurrer. (R. 30.)

An appeal was taken by the Government to the Court of Appeals of the District of Columbia. (R. 30–31.) That court certified to this Court the question whether it had jurisdiction to entertain this appeal or whether the appeal should have been taken to this Court under the Criminal Appeals Act. This Court held that the Court of Appeals had jurisdiction of the appeal under a provision of the Code of Laws for the District of Columbia. (289 U.S. 159.)

The Court of Appeals then rendered an opinion, holding that the trial court erred in sustaining the demurrer to the indictment. It held that all of the counts of the indictment were sufficient and that the Corrupt Practices Act was not unconstitutional. (R. 33–43.) One Justice dissented upon the ground that the indictment failed "to charge the crime defined in the statute, or any offense whatever." (R. 43–44.) This Justice did not discuss the question of the constitutionality of the Corrupt Practices Act.

22625—33——2

ARGUMENT

I

BY VIRTUE OF ARTICLE 1, SECTION 8, CLAUSE 18, OF THE CONSTITUTION, AND THE TWELFTH AMENDMENT, CONGRESS IS EMPOWERED TO REQUIRE THE TREASURERS OF POLITICAL COMMITTEES TO FILE STATEMENTS OF CONTRIBUTIONS MADE TO OR FOR THE COMMITTEE FOR THE PURPOSE OF INFLUENCING OR ATTEMPTING TO INFLUENCE THE ELECTION OF PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTORS

The question which is here involved is a narrow one. The sections of the statute which are involved in this case merely provide that in Presidential elections the treasurers of political committees must file with the Clerk of the House of Representatives returns showing their receipts and expenditures. It is submitted that such legislation is clearly constitutional.

As pointed out in the opinion of the Court of Appeals (R. 38, 39), the section of the Act of 1925—

> under which the indictment in this case is brought, does not attempt to interfere in any manner with the appointment of Presidential electors, nor to control the official conduct or proceedings of such electors when appointed. The section does no more than provide that in case of the voluntary organization of political committees which accept contributions or make expenditures for the purpose of influencing or attempting to influence the election of Presidential and Vice

Presidential electors, it shall be necessary that a public statement be made in a prescribed manner showing the amount of money received and expended by such committee for such purpose. No attempt is thereby made to prescribe any penalty for the commission or omission of any act upon the part of the Presidential electors themselves, nor to impose any duty upon them. Nor does the act undertake to regulate the action or proceedings of such committees in respect to the collection or distribution of funds nor any other activity designed to aid in electing or defeating any Presidential electors. The section simply requires that an account of such collections and distributions shall be made public. The national importance of such publicity is obvious.

The Twelfth Amendment to the Constitution (Appendix, p. 43, *infra*) imposes two specific duties upon the Houses of Congress in relation to the election of a President and a Vice President. First, it provides that after the certificates of the electors have been opened by the President of the Senate in the presence of the Senate and House of Representatives, "the votes shall then be counted." Second, if no one receives a majority of the whole number of electors for President, then from the three highest on the list of those voted for by the electors, the House of Representatives shall choose the President, and if no one receives a majority for Vice President, then from the two highest on the

list, the Senate shall choose the Vice President. For a further discussion of the Twelfth Amendment see *infra*, p. 21.

There is no provision as to how the votes shall be counted, and as to whether Congress can go "behind the returns" in the event objection is filed to any certificate, or in case there are more than one certificate from the same State, as to the course to be pursued.

Constitutional authority for the enactment by Congress of the statute involved in this case is found in Article I, Section 8, Clause 18, of the Constitution, which reads as follows:

> The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Chief Justice in his lectures on the Supreme Court of the United States, commenting upon Article I, Sec. 8, Clause 18, of the Constitution, said (p. 97):

> The Constitution not only gave to Congress enumerated powers, but it provided that Congress should have authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any De-

partment or Officer thereof." This was a grant of vast content. It was an express grant, although in general terms. Its significance was early appraised in *McCulloch* v. *Maryland* (1819, 4 Wheat. 316) where it was decided that Congress had power to incorporate a bank. That power was not explicitly conferred, but it was not necessary that it should be. It was a power deemed to be essential to the execution of the authority granted. There was found to be no phrase in the Constitution which, like the Articles of Confederation, excluded what were called incidental or implied powers. Chief Justice Marshall was not content with merely deciding the precise point. He was intent on the principles underlying the decision and in the *McCulloch case,* as in others, the logic of the opinion was of far greater importance than its result in the instant case. The Chief Justice refuted the argument that the powers of the general government were delegated by the States, which alone were truly sovereign, and must be exercised in subordination to the States which alone possessed supreme dominion * * *. Congress was entitled to make all laws which should be necessary and proper for carrying the powers expressly granted into execution. The Chief Justice found that the word "necessary" did not import "an absolute physical necessity". The word frequently imported no more than that one thing "is convenient, or useful, or essential to another". And, after many illustrations,

> the Chief Justice arrived at his fundamental principle; "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." * * *

Chief Justice Marshall in the *McCulloch* case (4 Wheat. 316), in construing Clause 18, of Article I, Section 8, further said (p. 419):

> 1st. The clause is placed among the powers of Congress, not among the limitations on those powers.
>
> 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.

This grant of powers was "a grant of vast content." It made clear the power of Congress to enact any legislation which may be necessary to make effective the system of government established by the Constitution even though the particular legislation is not expressly authorized as such. It made clear the power of the Federal Government to protect its own existence against fraud and corruption as well as against open violence. And it is an essential principle of our system of government that the Federal Government may deal with its citizens directly and not through such state action as was necessary in the days of the Confedera-

tion. Except in so far as the States are expressly given power to designate the method of choosing electors, Congress must by necessary implication from powers granted to the Federal Government, be authorized to enact any legislation designed to prevent fraud and corruption in the election of the President and the Vice President of the United States.

This Court has repeatedly held that Congress may exercise powers which are not granted to it in express terms but which are necessary in order to enable the Federal Government to exercise the powers which are entrusted to it. Thus Congress may establish banking corporations as fiscal aids to the Government. (*McCulloch* v. *Maryland,* 4 Wheat. 316; *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180.) It may make the treasury notes of the United States a legal tender in payment of private debts. (*Legal Tender Cases,* 12 Wall. 457, 535; *Juilliard* v. *Greenman,* 110 U.S. 421.) It may acquire property within the limits of a State by the exercise of eminent domain. (*Kohl* v. *United States,* 91 U.S. 367; *United States* v. *Gettysburg Electric Ry. Co.,* 160 U.S. 668.) It may protect its officers from violence when they are in the discharge of their duties. (*In re Neagle,* 135 U.S. 1.) In the *Legal Tender Cases* (12 Wall. 475, 535) this Court said:

> And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given

> nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code.

And in *United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668, 683, where the Government sought to condemn land for the preservation of the battlefield at Gettysburg, the Court said:

> The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

So also, as the Presidency of the United States is a position of transcendent importance in the government of the country, as the continued existence of the country may depend upon the integrity of the man chosen for that position, Congress must have power to guard Presidential elections from fraud and corruption. This Court in *Ex parte Yarbrough* (110 U.S. 651, 657) declared emphatically that:

> If this government is anything more than a mere aggregation of delegated agents of

other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.

The Constitution so spread the responsibility for the selection of a President as to grant to officers chosen under state legislation a share in the selection of the Chief Executive of the nation. But the electors are not performing any state function. The function is distinctively national in character, and, therefore, except so far as the electors are placed under state control by the Constitution, their selection must be subject to such Federal regulation as will prevent fraud and corruption in the choice of a President.

The information required to be filed by the Corrupt Practices Act might be of great value in aiding Congress to perform its constitutional duty of counting the votes and of electing the President and Vice President, where there is no election by the electors. It is of supreme importance and a matter of national concern that selection of the electors shall not be brought about by the illegal use of excessive campaign funds.

The baleful influence of the use of money in elections is so well recognized that practically all the States, as well as the Federal Government, have corrupt practices acts, the main feature of which is publicity of such contributions prior to, as well as after, the election.

When the Corrupt Practices Act was before Congress in 1924, Senator Borah offered an amendment providing for publicity respecting campaign contributions, and in speaking to his amendment said:

> Mr. President, the last few months have disclosed more pronouncedly than ever before, in my opinion, the necessity of the utmost publicity with reference to campaign funds. In my opinion, the real remedy for the abuse of the use of money in campaigns is that of publicity, rather than to undertake to control the matter through statutes which simply provide for punishment in case parties violating the law are arrested and convicted. In other words, I prefer to depend upon publicity for the purity of elections rather than criminal law.
>
> * * * * *
>
> It has been suggested that it would be sufficient to make publication of the campaign funds at the close of the campaign; but, in my opinion, that would not meet the situation. The contributions ought to be known as the campaign progresses, and the information ought to be fairly had and as fully as possible before the voters who are called upon to pass on the question, as it were, in voting for candidates upon the day of election.
>
> I think, therefore, that the publicity ought to accompany the progress of the campaign, and as nearly as it can be made to do so as a practical proposition, I desire to see that incorporated in the law.

(Cong. Rec., 68th Cong., 1st sess., Vol. 65, part 9, p. 9507.)

Senator Robinson in discussing the Borah Amendment said:

> The suggestion that full publicity respecting campaign contributions be required has value. It would penalize the candidate or the political party inviting or receiving contributions from questionable sources. It would have the effect of producing a reaction in public sentiment, which would reflect itself in election results.
>
> We all know—and I do not express this from any partisan standpoint—that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.
>
> (Cong. Rec., 68th Cong., 1st sess., Vol. 65, Part 9, p. 9507.)

The views of these two leaders of the Senate show that publicity such as is provided for in the

statute under consideration, is a matter of general public interest. If publicity of campaign contributions is "the real remedy for the abuse of money in campaigns" as asserted by Senator Borah, then a statute of Congress which undertakes to apply this remedy to Presidential elections should not be stricken down by this Court, unless it is clearly and unmistakably beyond the power of Congress. Every intendment is in favor of its constitutionality. It is conceded there is no express inhibition against such legislation.

The electors are appointed and act under and pursuant to the Constitution of the United States, and when electing the President or Vice President, they are performing a distinctively Federal function and as stated by Willoughby "On the Constitution of the United States," Vol. 3, Sec. 937, "when so acting and as to such acts, are subject to Federal supervision and control, though, of course, not to dictation as to whom they shall elect."

While the method of appointment of presidential electors is by the Constitution committed to the state legislatures, yet after they are selected, and have made their returns to the Congress, everything thereafter is exclusively committed to Congress. There is considerable contrariety of opinion as to the power of Congress with reference to the validity or legality of the votes of the electors in connection with its duty to count the votes. The Twelfth Amendment provides that the "votes

shall be counted," but makes no provision as to the power of Congress in this regard.

The first action by Congress on this question was in 1865. When Congress was about ready to count the electoral votes in the Presidential Election of 1864, a serious question arose as to whether the certificates of electoral votes from the Southern States should be received and counted or rejected. Certificates had been received from Louisiana and Tennessee. President Lincoln was committed to the validity and regularity of the Governments of these two States. A state government was in full operation in Louisiana and the election in Tennessee had been ordered by Governor Andrew Johnson, the candidate for Vice President on the ticket with President Lincoln. Stanwood, History of the Presidency, I, 309.

A joint resolution was passed by both Houses of Congress in January, 1865, providing that no electoral votes from any of the Southern States should be received or counted concerning the choice of President and Vice President for the ensuing term. The President was opposed to the resolution, as it in effect declared the invalidity of the governments of Tennessee and Louisiana. Congress was determined that the votes should not be counted and it was decided that if the votes from Louisiana and Tennessee could not be excluded by law, they could be by a joint action of the two houses in counting the vote. Accordingly, fearing that the President

would not sign the joint resolution, both branches of Congress passed the "twenty second joint rule," which provided that "no vote objected to should be counted except by the concurrent votes of the two Houses." This joint rule remained in force until January 20, 1876.

President Lincoln delayed action on the joint resolution until the day fixed for counting the electoral votes and signed the resolution on that day, and returned it to the House with his formal approval, in a message asserting his view that "the two Houses of Congress * * * have complete power to exclude from counting all electoral votes deemed by them to be illegal." (Cong. Globe, 38 Cong., 2d sess., I, 711.)

It was this omission in the Constitution which gave rise to the Hayes-Tilden contest in 1877, resulting in the creation of the Electoral Commission of 1877.

The Act creating this commission (January 29, 1877, c. 37, 19 Stat. 227) was entitled "An Act to provide for and regulate the counting of votes for President and Vice President, and the decision of questions arising thereon, for the term commencing March 4, A.D. 1877." Provision was made for interposing objections to the certificates of the electors.

The next legislation on this subject was the Act of February 3, 1887, ch. 90, 24 Stat. 373, which is entitled "An Act to fix the day for the meeting of the electors of President and Vice-President, and

to provide for and regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon," and which contains a provision for objections being filed to the certificates of the electors. This Act provides that the two Houses concurrently may reject votes of electors from a State, though there is only one return or certificate, when they agree that the vote has not been regularly given by the electors. If there is more than one return from a State, the procedure is prescribed for determining which return shall be counted.

This Act is still in force. U.S.C., Title 3, Sec. 17.

It is contended that the specific authority conferred by the Twelfth Amendment upon Congress to count the electoral votes for President and Vice President, and to elect a President and Vice President in the event of no election in the electoral college, carries with it no power except to add up the returns which upon their face appear regular regardless of fraud or illegality. The foregoing Acts of Congress show that for many years Congress has determined otherwise, and takes the view expressed by President Lincoln that the two Houses of Congress have complete power to exclude from counting all electoral votes *deemed by them illegal.*

THE TWELFTH AMENDMENT VESTS IN CONGRESS IMPORTANT POWERS AND DUTIES IN CONNECTION WITH THE ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT

Presidential electors are chosen in each State "in such manner as the legislature thereof may

direct." But they ballot only once and unless at that time a majority votes for the same candidate for President, the election of that official rests with the House of Representatives, and unless a majority votes for the same candidate for Vice President, the election rests with the Senate. The House and the Senate must choose from among the candidates voted for by the electors. Because the Houses of Congress possess such contingent power, which when exercised must be exercised promptly, Congress by necessary implication is empowered to observe whether electors, whose votes in the Electoral College select the candidates who may be considered by the Houses of Congress, are chosen with the aid of excessive campaign funds. In this respect, at least, the nature of the contests in the several States furnishes a proper basis for later action by the Houses of Congress; and Congress may by securing the necessary information prepare for the exercise of powers which the Constitution bestows, even though only contingently, upon the House of Representatives and the Senate.

A brief survey of the Constitution as considered in the Federal Convention of 1787 and as originally adopted, as amended in 1804, as applied in 1825 and 1837, and as amended again in 1933, will show that from the beginning of our government down to the present moment the Houses of Congress have possessed important powers in connec-

tion with the selection of the President and the Vice President of the United States.

The framers of the Constitution devised a complicated procedure for Presidential elections. Article II provided that the electors should be chosen in each State in accordance with state law; but they might meet only in their respective States; they must meet on the same day throughout the United States, and they might vote only once. Each elector might vote for two candidates, of whom one at least should not be an inhabitant of the same State as the elector. Unless, under such conditions, a preponderant majority of the electors voted for the same person for President, the House of Representatives selected the President, deciding between the two leading candidates if both candidates received the votes of a majority of the electors, as happened in 1801, or, if no candidate received a majority of the electoral votes, choosing any one of the five leading candidates, the Representatives from each State acting as a unit. After the choice of the President, the person having the greatest number of electoral votes was to be Vice President unless two persons received an equal number of votes, in which case the Senate was to select one of those two for that office.

The members of the Federal Convention did not anticipate that the electors would usually make the eventual choice of the President. On September 4 Mason declared that nineteen times in twenty the

President would not be chosen by the electors and Wilson substantially agreed with him. On the following day Pinckney expressed similar views. Mason said that it would rarely happen that a majority of the electoral votes would fall on any one candidate. He moved for election by plurality. The motion was overwhelmingly defeated. On September 6 Hamilton declared that the electors would not choose the President. The plan of the special committee had called for the eventual election by the Senate. Spaight contended that the electors should meet at the seat of the general government and decide finally without any reference to the Senate. Only one State voted for his motion. Wilson contended that the Senate had already been given so much power that it should not be allowed in fact to appoint the President. Doubtless for this reason, expressed also by Gerry, Williamson, Gouverneur Morris and Mason, the Convention accepted an amendment proposed by Sherman under which the House of Representatives, voting by States, was to make the eventual election.

In the Virginia convention Mason declared that the choice of the electors would not be decisive once in fifty times. Madison replied that the method of electing the President was a compromise under which the small States would have the advantage in the eventual election. (Elliot, Debates, III, 493, 495.) And in the North Carolina convention Spaight and Davie, who had been members of the Philadelphia convention, and Iredell, who was

afterwards a Justice of this Court, declared that as the electors must meet upon the same day throughout the country they could not confer together and combine. (Elliot, IV, 105, 122.)

In Number 39 of the Federalist Madison said that "The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives." In Number 66 Hamilton declared that the House of Representatives "will be the umpire in all elections of the President which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen."

Similar statements as to the compromise under which the eventual election of the President was given to the House of Representatives were contained in speeches by McHenry and Martin before the Maryland legislature in 1787 and in later speeches and writings by Dayton, Gouverneur Morris, King, and Madison. (Farrand, Records of the Federal Convention, III, 150, 217, 401, 405, 461, 462, 464.)

These provisions of the Constitution did not operate in all respects as had been anticipated. Electors voted in their respective States, but this requirement lost its significance when political parties nation-wide in scope were organized and electors simply voted for party candidates. The provision that each elector should vote for two men for the Presidency, of whom the man who received

next to the most votes should become Vice President, thwarted the popular will as to the Vice Presidency in 1797 and almost thwarted it as to the Presidency in 1801. (Stanwood, History of the Presidency, 1928 ed., I, 50, 52, 70.) After discussion which began in January, 1797, and lasted until 1804 (Ames, Proposed Amendments to the Constitution, 77, 323, 325; Stanwood, I, 77–79; Annals of Congress, VI, 1824; XI, 602, 1293, 304; XIII, 95, 543 note, 207, 775), the provision was changed by the Twelfth Amendment, called by its advocates a designating or discriminating Amendment (Annals, XIII, 16, 135, 180, 198), so that thereafter each elector voted for one person for President and for one person for Vice President; if no candidate for the Presidency received a majority the House of Representatives was to choose one of the three highest on the list; and if no candidate for the Vice-Presidency received a majority of the votes the eventual election was to be made by the Senate. Factional opponents had declared that the Amendment would reduce the influence of the smaller States in the election of the President (e.g., Annals, XIII, 164, 179, 516, 517); but most of the smaller States ratified it. (Annals, XIII, 104, 696, 770; Ames, 325.)

After the adoption of that Amendment only a majority of the electors could make a final election of either a President or a Vice President. In 1825 the eventual election of a President was by the House of Representatives and in 1837 the eventual

election of a Vice President was by the Senate. (Stanwood, I, 140, 187.) Story, Commentaries on the Constitution, declared (sec. 1464):

> The principal difficulty, which has been felt in the mode of election, is the constant tendency, from the number of candidates, to bring the choice into the House of Representatives. This has already occurred twice in the progress of the government; and in the future there is every probability of a far more frequent occurrence.

That the requirement of majority and not merely plurality votes in order to make the decisions of the Electoral College conclusive has not more frequently thrown the elections of President and Vice President into the Houses of Congress has been due simply to the fact that the United States, unlike European countries, has usually had only two important political parties, so that a plurality was a majority. That this condition may not always prevail was recognized by Congress when it framed the Twentieth Amendment. By that Amendment the terms of Senators and Representatives are made to begin on the 3d of January and the terms of the President and the Vice President are made to begin on the 20th of January, for the purpose of allowing the choice of the President and the Vice President, if there are not majorities in the Electoral College, to fall upon newly elected members of Congress and not upon members who were elected

two years before. Such a purpose on the part of those who framed the Amendment was shown by committee reports and by debates in Congress. (72d Cong., 1st sess., Sen. Rep. 26, House Rep. 345; 75 Cong. Rec., pt. 2, pp. 1372, 1373, pt. 4, pp. 3824, 3828, 3833.)

In short, the eventual elections of the President and the Vice President may rest with the Houses of Congress. This was not only provided for by the Constitution as adopted in 1788 and as amended in 1804 but, the Houses of Congress which framed the Twentieth Amendment and the States which made it a part of the Constitution in 1933 recognized it as a practical possibility for which they specially provided in terms newly introduced into the Constitution. Not only in theory but in practice, the Houses of Congress may be the authorities which eventually elect the President and the Vice President.

As the House of Representatives may be called upon to select a President from the three men most favored by the electors and the Senate to choose a Vice President from the two candidates favored for that office by the Electoral College, the House and the Senate are entitled to observe the manner in which the men who are presented to it for consideration have been chosen. Congress may require the submission to it of information which is not strictly private in its nature and which may, in its judgment, aid it in the exercise of powers which

are entrusted to it by the Constitution. This Court has repeatedly so held.

In re Chapman, 166 U.S. 661, involved the prosecution of a broker dealing in the stock of a sugar company who refused to testify before a Senate committee investigating the question whether any Senator had been speculating in sugar stocks during the consideration of the tariff bill then before the Senate. This Court said (p. 671):

> we quite agree with Chief Justice Alvey, delivering the opinion of the Court of Appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions"; and that it was to effect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof.

In *McGrain* v. *Daugherty*, 273 U.S. 135, which involved an investigation by the Senate into the administration of the Department of Justice, this Court upheld the arrest of a contumacious witness in pursuance of a Senate resolution. After reviewing the legislative practice, congressional enactments and court decisions (pp. 161–174) the Court said (pp. 174, 175):

> We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the

legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both Houses have employed the power accordingly up to the present time. * * * So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. * * * A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

And in *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, this Court decided that the Senate might, in the exercise of its power to judge of the elections, returns and qualifications of its members, compel witnesses to attend at its bar for the purpose of submitting to interrogation.

It is clear, then, that Congress is entitled to secure information "to enable the respective bodies to discharge their legitimate functions." And campaign funds certainly are not matters of merely private concern. The Act of February 28, 1925, c. 368, sec. 307, 43 Stat. 1053, 1072, U.S.C., Title 2, sec. 246, requires each candidate for election to Congress to file a public statement of receipts and expenditures in his campaign; and the statutes of every State of the Union except only Illinois, Mississippi and Rhode Island, require the filing of statements of receipts and expenditures in the primary elections or, much more frequently, in both the primary and the general elections of those States. Congress is entitled to know how much money has been raised and spent in each State in Presidential campaigns.

Moreover, as a President must be chosen before the 20th of January, Congress cannot wait until the electors have voted before it begins to assemble pertinent information as to the campaigns. It must have power to require that the recording of receipts and expenditures begin even before the electors are chosen, so that the inspection of those records may begin at once. Even though Congress

may take no action upon them at the time, it may well feel that the fact that they may be inspected by the public will do much to prevent misrepresentations in the returns. As the Constitution contemplates and provides for the eventual elections of the President and the Vice President by the Houses of Congress, Congress may properly prepare to make such elections even though the power to make the eventual elections is only a contingent one. Congress is also entitled to this information in order to properly discharge its duty to count the returns of the electoral votes.

II

THE INDICTMENT IS NOT FATALLY DEFECTIVE

The petitioners contend that because the indictment merely charged that one E. C. Jameson made contributions "for the political committee" instead of "to the political committee," this is an allegation of *indirect* contributions within the meaning of the Corrupt Practices Act and that therefore the indictment is defective because it failed to contain any allegations showing that the treasurer of the committee had knowledge of the contributions. According to the petitioners the indictment should have contained allegations that the contributions were accepted by the committee and were accounted for to the petitioner Burroughs as treasurer.

The position of the petitioners, as we understand it, is that where a contribution is not made directly

to the treasurer of a political committee, there is no obligation on the part of the treasurer to report it, unless the person to whom the contribution was made for the committee has rendered an account thereof to the treasurer of the committee. Under this theory it is of course immaterial that the treasurer may otherwise have known of the contribution. In reaching this conclusion the petitioners rely upon what we believe is a misconstruction of Section 243 of the statute. (R. 35.)

We think it is obvious that that section has no bearing upon the responsibility of the treasurer of a political committee to report contributions. It merely penalizes any person who, for or on behalf of a political committee, receives a contribution but fails to account for it to the treasurer of the committee. We must turn to other sections of the statute to determine the nature of the responsibility of the treasurer of a political committee with reference to reporting contributions.

Section 242 (b) of the Act (R. 34) makes it the duty of the treasurer of a political committee to keep a detailed and exact account of all contributions made to or for such committee, including the name and address of every person making any such contribution and the date thereof. We come now to Section 244 of the Act. (R. 35.) This section specifically makes it the duty of the treasurer of a political committee to file with the Clerk of the House of Representatives, at certain stated times, a statement containing "the name and address of

each person who has made a contribution to or for such committee in one or more items of the aggregate amount or value, within the calendar year, of $100 or more, together with the amount and date of such contribution." Another provision of this section requires the reporting, but not in detail, of sums contributed which do not aggregate $100. This is the only section of the statute which defines the duty and responsibility of the treasurer of a political committee in reporting contributions.

There is clearly nothing in this section which limits such responsibility either to contributions made directly to the treasurer of the committee or to those which have been accounted for to the treasurer by persons who receive them for the committee. As we view this section, it relates to any contribution made to or for a political committee of which the treasurer has knowledge. If the statute is viewed in this light, we think there can be no difficulty in determining the meaning of the penalty provisions of Section 252. (R. 36.) Paragraph (a) of this section makes it a misdemeanor for any person to "violate" any of the provisions of the Act, while paragraph (b) makes it a felony for any person to "willfully" violate any of the provisions of the statute. Under our interpretation of the statute, the treasurer of a political committee may not be penalized under either paragraph of Section 252 for failing to report a contribution unless he has knowledge of such contribution. The

distinction between the two paragraphs of that section is, we think, that under paragraph (a) the treasurer is punishable where he has knowledge of a contribution but merely through inadvertence, carelessness or neglect, or for some similar reason, fails to make the required report, whereas, under paragraph (b), he is punishable if, having knowledge of a contribution, he intentionally fails to report it.

With reference to the contention of the petitioners that the indictment should have alleged that the contributions were accepted by the committee, we submit that as the indictment uses the language of the statute in charging that Jameson made contributions "for the committee," this is sufficient.

We come now to the question whether the indictment sufficiently charged that petitioner Burroughs as treasurer of the committee had knowledge of the contributions which Jameson made for the committee.

(a) The "Willful" Counts

We submit that there can not be any serious question that knowledge by petitioner Burroughs as treasurer of the committee of the contributions made by Jameson for her committee is sufficiently charged in the first, third, fifth, and seventh counts, the so-called "willful" counts. These counts are based upon Section 252 (b) of the statute (R. 36) which punishes, as a felony, a "willful" violation of that Act. In each of these counts it is alleged that

the petitioner Burroughs as treasurer of the committee "unlawfully and feloniously did willfully violate" Section 244 of the Corrupt Practices Act by "unlawfully and feloniously willfully failing to file" the required statement of contributions with the Clerk of the House of Representatives. It is settled by the decisions of this Court that the word "willfully" implies that the act was knowingly and intentionally done. *Potter* v. *United States*, 155 U.S. 438, 446; *Spurr* v. *United States*, 174 U.S. 728, 734–735. See also *Chicago, St. P., M. & O. Ry.* v. *United States*, 162 Fed. 835 (C.C.A. 8th), certiorari denied, 212 U.S. 579.

In the light of these authorities, it is manifest that the allegation that petitioner Burroughs "did willfully violate" the statute by "willfully failing to file" a statement of the Jameson contributions means that petitioner Burroughs acted with knowledge of the contributions and of her duty to report them.

Furthermore, it should be borne in mind that here the offenses charged involve a "willful" failure to report the Jameson contributions. The charge of such "willful" failure must necessarily imply that it occurred knowingly and intentionally.

(b) The "Unlawful" Counts

In the second, fourth, sixth and eighth counts the indictment charged that petitioner Burroughs as treasurer of the political committee "unlaw-

fully did violate" Section 244 of the Act by "unlawfully failing to file" with the Clerk of the House of Representatives statements of the Jameson contributions. These counts are based upon paragraph (a) of Section 252, which makes it a misdemeanor for any person to "violate" any provision of the statute.

The court below, in dealing with these counts, said (R. 42):

> In the second, fourth, sixth, and eighth counts of the indictment the term "willfully" does not appear, the charge being that the offense was "unlawfully" committed. However, the crime charged in these counts is purely statutory and the statute makes no mention therein of a specific intent. In such cases it is held that whether scienter is a necessary element of the crime, though not expressed in the statute, is a question of legislative intent to be answered by a construction of the statute, and that punishment for an illegal act done by one in ignorance of the facts making it illegal, is not necessarily contrary to due process of law. *United States* v. *Balint,* 258 U.S. 250; *United States* v. *Behrman,* 258 U.S. 280, 288.

We are of the opinion that these counts are bad unless the allegation that the offenses were "unlawfully" committed imports knowledge by the petitioner Burroughs of contributions made by Jameson for the committee. In *United States* v. *Bard-*

enheier, 49 Fed. 846 (E.D. Mo.) the defendant was indicted for unlawfully altering revenue marks and stamps. The court said (p. 847):

> It will be conceded that an unintentional or accidental erasure of a stamp, or some part of it, is not an offense under section 3326. An indictment or information thereunder should accordingly allege that the act was done knowingly and intentionally, or it should employ language of a similar import. The present information avers that the defendant "did unlawfully change and alter" the marks and stamps in question. This sufficiently shows that the act was done willfully and intentionally, as otherwise it could not be said to have been done unlawfully.

(c) The Conspiracy Counts

In testing the sufficiency of the conspiracy counts, it is obvious that a different standard must be applied from that applied in the case of the substantive counts. The gist of the offense charged in each of the conspiracy counts was the unlawful agreement or understanding not to do an act which was required by the statute. It was not necessary in these counts to allege with technical precision all the elements essential to the commission of the offenses which were the objects of the conspiracies, or to state such objects with the detail required in an indictment for the substantive offenses. As was said in *Williamson* v. *United States*, 207 U.S. 425, 447, "certainty, to a common intent, sufficient to

identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." See also *United States* v. *Rabinowich*, 238 U.S. 78; *Frohwerk* v. *United States*, 249 U.S. 204; *Wong Tai* v. *United States*, 273 U.S. 77.

The first conspiracy count (the ninth count) specifically charged (R. 14–15) that the petitioner Burroughs was the treasurer of a political committee during the period from July 22, 1928, to March 16, 1929; that one Jameson on various dates during that period contributed the aggregate sum of $65,300 for that political committee; that at certain times during the period mentioned it was the duty of the petitioner Burroughs, as the treasurer of the political committee, to file with the Clerk of the House of Representatives a statement, as required by Section 244, of the details of these contributions; that the petitioner Burroughs, as treasurer, and the petitioner Cannon, as chairman of the political committee, "then well knowing all the premises aforesaid, unlawfully and feloniously did conspire, combine, confederate and agree together * * * to commit * * * the four willfully committed offenses" charged in the first, third, fifth and seventh counts of the indictment, the allegations of which were incorporated by reference. The second conspiracy count (the tenth count) is substantially the same, except that it alleges a conspiracy to commit the four unlawfully committed offenses specified in the second, fourth, sixth and

eighth counts of the indictment, which counts were likewise incorporated by reference.

It is difficult to perceive how the petitioners could "conspire * * * and agree together" to fail to file the statements of contributions required by the statute without having knowledge of these contributions. It is evident, therefore, that there was a sufficient averment of scienter in each count.

Furthermore, so far as the conspiracy alleged in the ninth count to "willfully" violate the statute is concerned, there can be no question that the word "conspire" imports an intent to violate the statute. As was said in *Frohwerk* v. *United States,* 249 U.S. 204, 209—

> intent to accomplish any object cannot be alleged more clearly than stating that parties conspired to accomplish it.

Moreover, as stated above, each of the conspiracy counts charged that the defendants did conspire "well knowing all the premises aforesaid." It is submitted that this in itself sufficiently charged knowledge of the contributions. The phrase, "all the premises aforesaid," referred to all the facts previously alleged in the conspiracy counts, including the fact that certain contributions were made on certain specified dates by Jameson for the committee. See *Brooks* v. *United States,* 267 U.S. 432, 440.

Similar allegations as to the Jameson contributions appearing in the substantive counts were also incorporated by reference in the conspiracy counts. It should be noted that even if any of the sub-

stantive counts are bad, their averments may nevertheless be treated as a part of the conspiracy counts by reference, without affecting the sufficiency of those counts. See *Blitz* v. *United States,* 153 U.S. 308, 317; *Fuller* v. *United States,* 53 App. D.C. 88, 288 Fed. 442.

In testing the sufficiency of the indictment in this case it must be remembered that the offenses charged were purely statutory. "In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter." *Pounds* v. *United States,* 171 U.S. 35, 38. As stated in *Cochran and Sayre* v. *United States,* 157 U.S. 286, 290, "the true test is, not whether it [the indictment] might possibly have been more certain, but whether it contains every element of the offence intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." See also *Evans* v. *United States,* 153 U.S. 584; *Dunbar* v. *United States,* 156 U.S. 185.

The indictment, we submit, did not omit any essential element of the offenses charged and it was sufficiently specific to permit the petitioners to prepare their defense and to plead a judgment under

the indictment as a bar to any further prosecution for the same offense.

It was not necessary to state in the indictment such details as the identity of the members of the political committee or of the persons to whom the contributions were made. These details were mere matters of evidence. *Cf. Evans* v. *United States, supra; Cochran and Sayre* v. *United States, supra; Stokes* v. *United States,* 157 U.S. 187; *Burton* v. *United States,* 202 U.S. 344. The identity of the members of the political committee or of the person or persons to whom the contributions were made are not elements of the offenses charged. A defendant may be fully informed of such details by a bill of particulars. *Bartell* v. *United States,* 227 U.S. 427, 432–433; *Rudner* v. *United States,* 281 Fed. 516, 518 (C.C.A. 6th), certiorari denied, 260 U.S. 734.

CONCLUSION

For the reasons hereinbefore given it is respectfully submitted that the Corrupt Practices Act, in so far as it relates to presidential and vice presidential electors is constitutional and valid, that the indictment herein is not bad in form or substance, and that the judgment below should be affirmed.

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NOVEMBER 1933.

APPENDIX

THE TWELFTH AMENDMENT

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member

or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

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